Before the
FEDERAL COMMUNICATIONS COMMISSION **FCC 94-287**
Washington, D.C. 20554

In the Matter of)
)
Implementation of the Cable)
Television Consumer Protection) MM Docket No. 92-265
and Competition Act of 1992)
)
Development of Competition and)
Diversity in Video Programming)
Distribution and Carriage)

MEMORANDUM OPINION AND ORDER ON RECONSIDERATION OF THE FIRST REPORT AND ORDER

Adopted: November 10, 1994 Released: December 9, 1994

By the Commission: Commissioner Barrett issuing a statement.

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I. INTRODUCTION

1. On October 5, 1992, Congress enacted the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act").[1] The 1992 Cable Act amended the Communications Act of 1934, in part, by adding, among other things, new Section 628. Section 628 is intended to foster the development of competition to traditional cable systems by governing the access by competing multichannel systems to cable programming services. Section 628(b) prohibits "unfair methods of competition or unfair or deceptive acts or practices, the purpose or effect of which is to hinder significantly or to prevent" competing distributors from providing programming to their customers.[2] Section 628(c) instructs the Commission to adopt regulations to specify particular conduct that is prohibited by subsection (b).[3] Pursuant to that mandate, on April 1, 1993, the Commission adopted its *First Report and Order*, which set forth the Commission's program access rules and procedures to implement these statutory provisions.[4]

2. The Commission has received various petitions for reconsideration of the *First Report and Order*. A list of petitioners and commenters is at Appendix B. In this *Memorandum Opinion and Order* ("MO&O"), we dispose of those issues raised for reconsideration. Specifically, in this MO&O, we affirm our initial determinations that (i) a showing of harm is not required for actions brought under Section 628(c); (ii) differences in costs at the programming distributor's level cannot justify pricing differences by a satellite

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[1] Pub. L. No. 102-385, 106 Stat. 1460 (1992).

[2] 47 U.S.C. § 548(b).

[3] 47 U.S.C. § 548(c).

[4] *Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992-- Development of Competition and Diversity in Video Programming Distribution and Carriage*, MM Docket 92-265, 8 FCC Rcd 3359 (1993) (*"First Report & Order"*).

cable or broadcast programming vendor in the sale or delivery of satellite cable programming or satellite broadcast programming among or between cable systems, cable operators, or other multichannel video programming distributors; (iii) the Commission's rules apply to contracts that were in existence before the effective date of the rules[5]; and (iv) the five percent attribution standard should be used to assess the existence of vertical integration.

3. In addition, in this MO&O, we grant certain petitions to the extent they request the Commission: (i) to extend the existing confidentiality protection in the rules to proprietary materials exchanged during the pre-complaint negotiation period required under the rules; (ii) to permit a party to seek permission from the Commission to further restrict an opposing party's access to proprietary information; (iii) to amend the rules on subdistribution arrangements in areas unserved by cable to clarify that nonexclusive subdistribution agreements in both served and unserved areas are treated the same and subject to the protection provided by the rules; (iv) to clarify the rules regarding the financial liability of buying groups, and (v) to determine that, once a programming vendor has shown the Commission that a "similarly-situated" competitor is the proper focus for comparison in justifying price differentials between distributors, a "similarly-situated" competitor also is the proper focus to justify a *de minimis* differential.

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[5] Three additional petitions were filed that relate to the effective date of the program access rules. The issues raised in those petitions are now moot. Specifically, WJB-TV Ft. Pierce Limited Partnership ("WJB") filed a petition contending that the program access rules against exclusive contracts should be deemed effective immediately upon the enactment of the 1992 Cable Act (December 4, 1992) or on the effective date of the Commission's program access rules (July 16, 1993) in contrast to delaying the effective date of the rules until the end of the 120 day renegotiation period that was provided for under the rules. Because the rules are now effective, the issue raised by WJB is moot. The Wireless Cable Association, Inc. ("WCA") filed a Request for Clarification that the Commission specify a specific date before which any party intending to enforce an existing exclusive programming agreement must file an exclusivity petition. WCA contended that the 120-day renegotiation period before the program access rules became effective applies only to discrimination barred by the rules and not exclusive agreements. Because all existing contracts must be in compliance with the rules, WCA's request is moot. Finally, Discovery Communications, Inc. ("Discovery") and Viacom International, Inc.("Viacom") filed petitions contending that distributors seeking to revise existing contracts should be required to demonstrate that the current contract terms have the purpose or effect to harm the distributor's ability to compete. Discovery contended that under this proposal only the contracts that create a potential for harm will need to be reformed, while other agreements can be brought into strict compliance with the rules as they come up for renewal, thereby avoiding administrative upheavals to programmers. The November 15, 1993 deadline by which all contracts were required to come into compliance with the Act and our rules has now passed and thus these issues are moot.

4. In addition, the Commission determines that it does have the authority under Section 628 to award damages for violations of the program access rules, but determines that creating such a remedy for violations of the program access rules is not necessary at this time. If, contrary to our expectations, it is brought to the Commission's attention that the current process for resolving complaints is not working, the Commission will consider revisiting this issue. Finally, the Commission denies the petition submitted by the Caribbean Satellite Network ("CSN") on the ground that the Commission already considered CSN's comments both in the *First Report and Order* and in the *Second Report and Order*.[6] This MO&O also emphasizes certain procedural requirements for all types of program access complaints and clarifies the discussion in the *First Report and Order* of those procedural requirements.

5. In addition to the petitions discussed in this MO&O, the National Rural Telecommunications Cooperative ("NRTC") also filed a petition for reconsideration challenging the Commission's interpretation of 47 U.S.C. Section 548(c)(2)(C) governing the permissibility of exclusive contracts in areas unserved by cable operators. This issue will be the subject of a separate *Memorandum Opinion and Order*.

II. DAMAGES

6. *Background*. Under the program access provisions of the 1992 Cable Act, alleged violations of Section 628(b) or the Commission's rules implementing Section 628(c) are adjudicated before the Commission.[7] In Section 628(e)(1), Congress granted the

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[6] The Caribbean Satellite Network, Inc. ("CSN") petitioned the Commission to amend the *First Report and Order* on the ground that CSN was not listed as a commenter in the *First Report and Order* and, thus, its comments were not considered. The late comments of CSN were considered by the Commission and noted in the *First Report and Order* (8 FCC Rcd at 3451 n.91) and in the *Second Report and Order* in *Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992--Development of Competition and Diversity in Video Programming Distribution and Carriage*, MM Docket No. 92-265 (Oct. 22, 1993), 9 FCC Rcd 2642 (1993) ("*Second Report and Order*"). The majority of CSN's comments did not address implementation of Section 19 of the 1992 Cable Act, the issues addressed in the *First Report and Order*, but rather involved issues relating to Section 12 that were addressed in the *Second Report and Order*. Thus, the Commission appropriately discussed CSN's comments in the *Second Report and Order*. CSN's petition is therefore denied.

[7] 628(d) provides: "[a]ny multichannel video programming distributor aggrieved by conduct that it alleges constitutes a violation of subsection (b), or the regulation of the Commission under subsection (c), may commence an adjudicatory proceeding at the Commission." 47 U.S.C. § 548(d).

Commission the authority, upon completion of such adjudication, "to order appropriate remedies, including, if necessary, the power to establish prices, terms, and conditions of sale of programming to the aggrieved multichannel video programming distributor."[8] Section 628(e)(2) further states that "the remedies in paragraph (1) are in addition to and not in lieu of the remedies available under Title V or any other provisions of this Act."[9] (emphasis added)

7. In the *First Report and Order*, the Commission stated that with respect to prohibited exclusive agreements:

> we may order the vendor to make its programming available to the complainant on the same terms and conditions, and at a non-discriminatory rate, as given to the cable operator. In addition, we may impose sanctions available under Title V of the Communications Act. We do not believe, however, that the 1992 Cable Act grants the Commission the authority to assess damages against the programmer or cable operator.[10]

The Commission further stated that in most price discrimination cases:

> the appropriate remedy will be to order the vendor to revise its contract or offer to the complainant a price or contract term in accordance with the Commission's findings. However,...the statute provides broad authority to the Commission to order additional remedies or impose sanctions for violations of Section 628, which will be used in appropriate circumstances.[11]

8. NRTC[12] petitioned the Commission to reconsider its prior determination that the Commission is not authorized to award damages to an aggrieved multichannel video programming distributor ("MVPD") for a violation of the program access rules.[13] NRTC

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[8] 47 U.S.C. § 548(e)(1).

[9] 47 U.S.C. § 548(e)(2).

[10] 8 FCC Rcd at 3392.

[11] *Id.* at 3420.

[12] Petition For Reconsideration of the National Rural Telecommunications Cooperative, June 10, 1993 ("NRTC Petition"). NRTC and its members are multichannel video programming distributors which distribute programming packages to Home Satellite Dish ("HSD") subscribers and Direct Broadcast Satellite ("DBS") services to subscribers in rural areas. NRTC Petition at 2-3.

[13] *Id.* at 5, 9.

argued that Section 628(e) provides a broad grant of authority to award appropriate remedies[14] and that the Commission's determination that the 1992 Cable Act does not grant authority to award damages has unnecessarily restricted the Commission's authority under the 1992 Cable Act to order appropriate remedies, including damages, for violation of the program access rules.[15]

9. NRTC further argued that "[d]amages are traditionally regarded as an 'appropriate remedy' imposed by the Commission for violation of its nondiscrimination requirements."[16] As support, NRTC cited to other sections of the Communications Act, including Section 202 (prohibition against certain unjust or unreasonable discrimination by common carriers); Section 206 (subjecting a common carrier to liability to any person injured as a result of unjust or unreasonable discrimination for the full amount of damages sustained, together with reasonable counsel fees); Section 207 (allowing any person unjustly or unreasonably discriminated against by any common carrier to make a complaint to the Commission); and Section 209 (authorizing the Commission to award damages for unjust or unreasonable discrimination by a common carrier).[17] NRTC argued that "the Commission should reserve the same type of discretion to award damages to an aggrieved MVPD for unlawful discrimination in the provision of programming."[18]

10. NRTC also contended that damages are necessary because forfeitures alone will be an inadequate deterrent to anticompetitive conduct[19] and that "[w]ithout the possibility of an appropriate award of damages, program vendors have no incentive to discontinue their discriminatory pricing practices, and will be motivated to prolong complaint proceedings.[20] NRTC stated that some programming vendors have indicated to NRTC that they do not intend to comply with the Commission's rules.[21]

11. The Bell Atlantic Telephone Companies ("Bell Atlantic") and Consumer Federation of America ("CFA") filed comments in support of NRTC's petition, and argued

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[14] *Id.* at 4.

[15] *Id.* at 5.

[16] *Id.*

[17] *Id.*

[18] *Id.* at 6.

[19] *Id.* at 6-7.

[20] *Id.* at 7.

[21] *Id.* at 8.

that Section 628(e) provides a broad grant of authority to award appropriate remedies.[22] Bell Atlantic argued that damages are authorized because Section 628(e) expressly gives the Commission the authority "to grant all other remedies provided for under 'any other provisions of this Act', and that those 'other provisions' of the Communications Act expressly provide for the recovery of damages."[23] In addition, Bell Atlantic and CFA contended that an award of damages would further the public interest by deterring the anticompetitive conduct that the program access provisions of the 1992 Cable Act sought to end.[24]

12. Several programming vendors and cable operators opposed NRTC's petition asserting various arguments against an interpretation of the statute that would authorize the Commission to award damages for violations of the program access rules. First, while several commenters conceded that Section 628(e) provides a broad grant of authority to award appropriate remedies, they nonetheless argued that it does not authorize damages as a remedy.[25] For example, Discovery argued that Section 628 contains no explicit reference to damages, so the Commission should not impose a punitive remedy by virtue of a general authority to fashion an appropriate remedy.[26] Second, various commenters contended that, if Congress intended to authorize the Commission to award damages in program access cases, Congress could have, but did not, expressly incorporate by reference the remedies available under Title II.[27]

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[22] Comments of Bell Atlantic on Petitions For Reconsideration, July 14, 1993 ("Bell Atlantic Comments") at 11; Letter from Bradley Stillman, Legislative Counsel of Consumer Federation of America, dated July 8, 1993 ("CFA Letter") at 1.

[23] Bell Atlantic Comments at 11-12 (citing 47 U.S.C. §§ 207, 209); Reply of Bell Atlantic to Petitions For Reconsideration ("Bell Atlantic Reply") at 4-5.

[24] Bell Atlantic Comments at 11-12; CFA Letter at 1.

[25] Opposition To Petition For Reconsideration by Discovery Communications, Inc., July 14, 1993 ("Discovery Opposition") at 1-5; Liberty Media Corporation's Opposition To The National Rural Telecommunications Cooperative's Petition For Reconsideration, July 14, 1993 ("Liberty Media Opposition") at 4-7; Opposition of Superstar Connection To Petition For Reconsideration, July 14, 1993 ("Superstar Opposition") at 12-14; Opposition of Time Warner Entertainment Company, L.P., To Petitions For Reconsideration or Clarification, July 14, 1993 ("Time Warner Opposition) at 5-6; Opposition of United Video, Inc., July 14, 1993 ("United Video Opposition") at 2-3; Opposition To Petition For Reconsideration of Viacom International, Inc., July 14, 1993 ("Viacom Opposition") at 13-14; Reply of Landmark Communications, Inc. To Oppositions, July 26, 1993 ("Landmark Reply") at 5-6.

[26] *Id.*

[27] Viacom Opposition at 14; Liberty Media Opposition at 6; Discovery Opposition at 3.

13. Third, commenters contended that the remedies provided under Title II of the Communications Act are not available to aggrieved multichannel video programming distributors ("MVPDs") under the program access rules because Title II only applies to common carriers' conduct.[28] These petitioners contended that, because cable operators and programming vendors are not common carriers, the damages authorized under Section 209 in Title II are not available under Section 628(e).[29] Superstar also contended that petitioner's reliance on Title II is misplaced because of the difficulty in assessing damages under Section 19. Superstar noted that "the actual measure of damages in common carrier proceedings is limited to the particular profits which are lost due to customers subscribing to a competitor's service," and that, in contrast, NRTC wants the distributor to be able to recover unfair payments of discriminatory rates.[30] Moreover, Superstar contended that it would be speculative to assume that the price of programming charged to a distributor alone caused a customer not to subscribe to a particular technology and, thus, awarding damages, even as lost profits, would be speculative and not based on any business or market evidence.[31]

14. Fourth, commenters disputed NRTC's argument that absent the authority to award damages, the remedies available to the Commission are inadequate to deter anticompetitive conduct.[32] Commenters contended that the Commission's ability to impose sanctions provides sufficient incentive to comply with the rules.[33] Discovery and Liberty Media Corporation ("Liberty Media") contended that the Commission's streamlined procedure for handling complaints is sufficient to promote fair access to programming.[34] United Video, Inc. ("United Video") contended that the Commission's authority to establish "non-discriminatory prices for programming ... is a sufficient remedy" and that program vendors do not need additional incentives to comply with the program access regulations.[35]

15. In response to these oppositions, NRTC replied that damages must be awarded

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[28] Discovery Opposition at 3; Liberty Media Opposition at 4-5; Superstar Opposition at 12; Time Warner Opposition at 6 n. 6; Landmark Reply at 6.

[29] Superstar Opposition at 12; Time Warner Opposition at 6 n.6; Landmark Reply at 6.

[30] Superstar Opposition at 13.

[31] *Id.* at 13-14.

[32] Discovery Opposition at 3; Liberty Media Opposition at 7-8; Time Warner Opposition at 6; United Video Opposition at 2-3; Landmark Reply Comments at 6-7.

[33] Liberty Media Opposition at 7-8; Time Warner Opposition at 6; Landmark Reply at 7.

[34] *Id.* at 4; Liberty Media Opposition at 7.

[35] United Video Opposition at 2.

to make an aggrieved party whole and that awarding damages is within the Commission's discretion.[36] NRTC stated that it does not contend that Title II and Section 628 are the same, but that "Title II is just one *example* of an area where the Commission in the past has ordered damages as an 'appropriate remedy.'"[37] Bell Atlantic also replied to the oppositions, arguing, *inter alia,* that, by "incorporating remedies that would be available under other provisions of the Act, Congress expressly authorized damages for program access complaints."[38]

16. *Discussion.* In the *First Report and Order,*[39] the Commission stated that it would prohibit the enforceability of a prohibited exclusivity arrangement and require the programming vendor to make its programming available on the same terms and conditions as given to cable operators. The Commission also stated that, in addition to ordering such relief, it could impose sanctions under Title V of the Act (e.g., forfeitures). The Commission stated that it did not believe that the 1992 Cable Act provided it with authority to assess damages against a cable operator or programming vendor.

17. In response to NRTC's petition for reconsideration, we have reexamined the statute and legislative history, and we now conclude that Section 628(e) provides the Commission with broad authority to order appropriate remedies. In our judgment, this authority is broad enough to include any remedy the Commission reasonably deems appropriate, including damages.[40] Although petitioners are correct that the statute does not expressly use the term "damages," it does expressly empower the Commission to order "appropriate remedies." Because the statute does not limit the Commission's authority to determine what is an appropriate remedy, and damages are clearly a form of remedy,[41] the

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[36] NRTC Reply at 7.

[37] *Id.* at 8.

[38] Bell Atlantic Reply at 4-5.

[39] *First Report and Order,* 8 FCC Rcd at 3392

[40] We do not believe that the cases of *Karahalios v. National Federation of Federal Employees, Local 1263*, 489 U.S. 527(1989), *Massachusetts Mutual Life Insurance Co. v. Russell*, 473 U.S. 134 (1985), and *Transamerica Mortgage Advisors, Inc. v. Lewis,* 444 U.S. 11 (1979), cited by Time Warner in its *ex parte* presentation of November 3, 1994, suggest otherwise. The basic issue in each of these cases was whether the statute or act in question implicitly created a "private cause of action" in federal court, particularly where Congress had provided specific remedies either at the administrative level or judicial level, or both. Here, Congress has expressly afforded the Commission the authority to order appropriate remedies and, thus, we find these cases inapplicable.

[41] *See* Black's Law Dictionary, Revised 4th Ed. (St. Paul, Minn. 1968)

plain language of this part of Section 628(e) is consistent with a finding that the Commission has authority to afford relief in the form of damages. The legislative history is to the same effect.[42]

18. While we have determined that the statute's grant of power to the Commission to award appropriate remedies is broad enough to include damages, we are not persuaded by petitioners' arguments that creating such a remedy for violations of the program access rules is necessary at this time. Instead, we believe that the sanctions available to the Commission, pursuant to Title V, together with the program access complaint process, are sufficient to deter entities from violating the program access rules. Our experience over the past year suggests that the program access provisions of the statute and our implementing regulations are successfully working to achieve Congress' goal of increasing competition to traditional cable systems by providing greater access by competing multichannel systems to cable programming services.[43] If, contrary to our expectations, it is brought to our attention that the current processes are not working, we will consider revisiting this issue.

III. ATTRIBUTION

19. *Background*. Section 628(b)[44] proscribes "a cable operator, a satellite cable programming vendor in which a cable operator has an attributable interest, or a satellite broadcast programming vendor" from engaging in unfair practices." We stated in the *First Report and Order* that, "a principal target of the restrictions contained in Section 628 is the conduct of vertically integrated satellite cable programming vendors."[45]

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[42] In describing the House provision regarding program access, which was the basis for the version ultimately adopted, the Conference Committee stated, without any limitation, that the FCC "shall order appropriate remedies." H. Conf. Rep. No. 862, 102d Cong., 2d Sess 92 (1992).

[43] *See In the Matter of Implementation of Section 19 of the Cable Television Consumer Protection and Competition Act of 1992, Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, CS Docket No. 94-48 (September 28, 1994) at ¶173. In this report, the Commission noted that the commenters in this proceeding have not complained about widespread unavailability of programming to distributors competing with cable operators. To the contrary, we noted that commenters indicated that the program access rules have facilitated increased competition in the video marketplace and that a relatively small number of complaints have been filed with the Commission concerning denial of access to programming on the grounds of exclusivity agreements.

[44] 47 U.S.C. § 548(b).

[45] *First Report and Order*, 8 FCC Rcd at 3369.

20. In assessing vertical integration, the Commission stated that it would "consider a cable operator to have an attributable interest in a programming vendor if the cable operator holds five percent or more of the stock of the programming vendor, whether voting or non-voting."[46] In deciding on this standard, we noted that:

> various attribution rules have been used by the Commission and by other regulatory agencies depending on the specific policy or rule in question, *e.g.*, whether control, influence or some other aspect of the relationship is involved, and on an evaluation of the costs and risks associated with various levels of ownership or influence. The policy objective involved here, we believe, warrants a relatively inclusive attribution rule.[47]

21. The Commission also noted that the attribution standard was consistent with the video dialtone standard [48] and that "the intent of the video dialtone proceeding is more analogous to the intent of Congress in adopting Section 628, i.e., to curb incentives for influencing behavior of affiliates to the detriment of competitors."[49] The Commission noted its concern "that a standard of more than five percent could allow cable operators to exert significant influence over their affiliated programmers without being subject to the statute."[50]

22. In adopting a five percent attribution test, the Commission rejected various commenters' proposals that we adopt a behavioral test for assessing attribution. We stated that:

> [t]o provide certainty to the cable industry and the public, it is imperative that we develop a clear directive with respect to which entities will be deemed subject to the statute and our implementing rules. A behavioral test is necessarily *ad hoc* and therefore would not provide sufficient certainty.[51]

23. The Commission also declined to adopt an exemption from our attribution standards for a programming vendor whose aggregate subscriber base from its affiliated cable owners represented less than five percent (or some small number) of its total program

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[46] *Id.* at 3370.

[47] *Id.*

[48] *Id.*

[49] *Id.*

[50] *Id.* at 3370-71 (citations omitted).

[51] *Id.* at 3371.

subscribership. We noted that "the record does not provide sufficient data to support a definitive point at which the incentives for such vendors to favor their affiliated customers differ from other vertically integrated programming vendors, but left open the possibility of revisiting this exemption "to the extent that parties are able to provide information regarding the incentives and past conduct of vendors with *de minimis* vertical interests."[52] The Commission also declined to adopt a more flexible attribution standard for minority-owned cable programming vendors, but noted that "we could revisit this attribution standard, to the extent that it is consistent with this section of the 1992 Cable Act, and would promote minority programming." [53]

24. Accordingly, the Commission promulgated § 76.1000(b),[54] which provides:

> For purposes of determining whether a party has an 'attributable interest' as used in this subpart, the definitions contained in the notes to § 76.501 [the broadcast attribution standard] shall be used, provided, however that:
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> (1) The single majority shareholder provisions of Note 2(b) to § 76.501 and the limited partner insulation provisions of Note 2(g) to § 76.501 shall not apply; and
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> (2) The provisions of Note 2(a) to § 76.501 regarding five (5) percent interests shall include all voting or nonvoting stock or limited partnership equity interests of five (5) percent or more.

A. *De Minimis* Exemption

25. Viacom[55] renewed its request that the Commission adopt a *de minimis* exemption from the attribution standard; *i.e.*, an exemption for vertically integrated program

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[52] *Id.* at 3371, n.19.

[53] *Id.*

[54] 47 C.F.R. §76.1000(b).

[55] Liberty Media also filed a petition which, among other things, contended that the Commission's attribution standard is overinclusive and arbitrary. Liberty Media, however, did not advocate the adoption of a *de minimis* exemption, but rather requested the Commission to incorporate the single majority shareholder, limited partner, and non-voting shareholder exceptions recognized under the broadcast attribution standards. Liberty Media's Petition at 8. This portion of Liberty Media's petition will be dealt with in subsection B, supra.

services whose commonly-owned cable systems account for a relatively insignificant portion of that program service's total subscribership.[56] Viacom contended that a programming vendor should not be considered vertically integrated for purposes of the program access provisions' attribution standard if the programming vendor is under common ownership with cable systems accounting for less than five percent of the total number of subscribers to the particular program service.[57] Viacom requested that the Commission revisit this issue and adopt an exemption based on a study it submitted (the "Crandall Study").[58] Viacom contended that this study "demonstrates conclusively that for virtually any reasonable assumptions concerning affected markets, there will be no ability or incentive to effectively discriminate against alternative technologies at the captive subscribership level proposed by Viacom, (*i.e.*, less than five percent of total subscribership to the given affiliated program service)."[59]

26. The Crandall study analyzes the profitability of discriminatory practices in terms of the potential for such discrimination successfully to induce customers to switch to the vertically integrated firm's cable system. Under the Crandall Study, a rational profit-maximizing firm will engage in a discriminatory policy only if the profits from customer switching are greater than the losses from the decreased sales of the programming. The Crandall Study concludes that there are no economic incentives for anticompetitive behavior by vertically integrated firms with small (under 5%) national subscriber levels. In addition, the Crandall Study indicates that the absence of a *de minimis* exemption will create an impediment to entry into the cable programming market.

27. Viacom also contended that its own behavior in serving alternative technologies supports its proposed exemption:

> recognizing its need to maximize revenues from its program services, [Viacom] has marketed to all alternative distribution technologies on a nationwide basis. For example, distribution by SMATV [satellite master antennae televisions], MMDS [multichannel multipoint distribution service] and TVRO [television receive only] provides approximately 12% of the combined subscriber base of Viacom's premium services, Showtime and The Movie Channel.[60]

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[56] Petition For Reconsideration and Clarification, filed by Viacom International, Inc., June 10,1993 ("Viacom Petition").

[57] Viacom Petition at 2-3.

[58] Crandall R. and Glassman M., *The Economic Case for a De Minimis Exemption From The Commission's Program Access Rules.* ("Crandall Study").

[59] Viacom Petition at 5.

[60] *Id.* at 7.

Viacom further contended that it is in Viacom's interest as a programming vendor to increase penetration to alternative technology distributors in order to limit the bargaining power that cable operators have in their local markets.[61]

28. Landmark filed a reply supporting Viacom's petition and urged the Commission to adopt the Crandall Study's recommended *de minimis* exemption.[62] Likewise, Hearst/ABC-Viacom Entertainment Services, d/b/a Lifetime Television ("Lifetime") submitted a reply supporting Viacom's petition.[63] Lifetime argued that the current attribution standard is more inclusive than necessary to serve the statute's purposes and may hinder capital investment in program creation and distribution as cable operators may refrain from investing in new or failing program services to avoid the statutory program access requirements.[64] Lifetime cited to its own practices and behavior as confirmation of the Crandall Study's conclusion.[65]

29. Group W Satellite Communications ("Group W") filed comments in support of Viacom's petition on this issue.[66] Group W contended that:

> none of the companies involved in the distribution of either TNN and CMT has any incentive to favor affiliated cable customers. Past conduct of all those companies reveals that distribution policies applicable to the services [TNN and CMT] are formed and followed with no acknowledgment of the existence of affiliated cable

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[61] *Id.* at 8.

[62] Landmark Reply at 3.

[63] Reply Comments of Lifetime Television, July 26, 1993 ("Lifetime Reply").

[64] Lifetime Reply at 4.

[65] *Id.* at 5.

[66] Comments of Group W Satellite Communications in Support of Petitions For Reconsideration and Clarification, July 14, 1993 ("Group W Comments"). Group W is a venture comprised of direct and indirect wholly-owned subsidiaries of Westinghouse Broadcasting Company, Inc. ("WBC"). Group W distributes cable programming services including The Nashville Network ("TNN") and Country Music Television ("CMT"). The TNN service is wholly-owned by Opryland USA Inc, an indirect subsidiary of Gaylord Entertainment Company. The CMT service is wholly-owned by Country Music Television, Inc.("CMTI"), a corporation owned indirectly by subsidiaries of Gaylord and WBC. Group W is affiliated with a cable system that serves approximately 11,000 subscribers and Gaylord owns a majority interest in four cable systems that serve approximately 170,000 subscribers. *Id.* at 2 n. 1.

customers, either in dealings directly with those few cable operations or in dealings with any other third parties.[67]

30. Consumer Satellite Systems, Inc. ("CSS") opposed Viacom's petition contending that as an independent HTVRO [home television receive only] MVPD it has been paying rates to Viacom which appear to be high in relation to rates paid by cable systems with fewer subscribers than CSS and by cable affiliated HTVRO distributors.[68]

31. DirecTV, Inc. ("DirecTV") also opposed Viacom's petition, disputing Viacom's contention that Viacom's own behavior in dealing with MVPD cable competitors supports the *de minimis* exemption it seeks: "Viacom does not mention that it has not yet made its programming available to DirecTV...."[69]

32. The Wireless Cable Association, Inc. ("WCA") opposed Viacom's petition, contending, *inter alia,* that despite Viacom's claim of its willingness to deal with alternative technologies, "Viacom has admitted that its pricing policies discriminate against non-cable MVPDs in comparison to cable operators."[70] WCA cited to the Commission's finding in its 1990 Competition Report that the top wireless cable rate for one of Viacom services was 59.1% more than the top rate charged to cable operators.[71]

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[67] *Id.* at 3.

[68] Statement of Opposition of Consumer Satellite Systems, Inc. To Petitions For Reconsideration, July 12, 1993 ("CSS Opposition") at 6. CSS sets forth the following claims:

* Top rate paid by a cable operator for carriage of the Viacom services MTV, VH-1, and Nickelodeon-$0.60.

* Estimated rate paid by cable affiliated HTVRO distributor for MTV, VH-1, and Nickelodeon - $2.40.

* Rate paid by CSS for MTV, VH-1, and Nickelodeon-$3.85.

(citing *Cable TV Programming*, Paul Kagan Associates, Inc. April 30, 1993.)

[69] DirecTv Opposition at 12.

[70] Opposition To Petitions For Reconsideration, July 14, 1993, filed by The Wireless Cable Association International, Inc. ("WCA Opposition") at 8 (citing Comments of Viacom International, Inc., in MM Docket No. 92-265, filed Jan 25, 1993).

[71] *Id.* (citing *In the Matter of Competition, Rate Deregulation and the Commission's Policies Relating to the Provisions of Cable Television Service*, 5 FCC Rcd 4962, 5117 (1990)).

33. GTE Service Corporation ("GTE") also opposed Viacom's petition contending that it would be inconsistent to adopt Viacom's requested exemption based on perceived attenuation of influence. GTE argued that if programming vendors have incentives to engage in prohibited practices even as to non-affiliated systems, *a fortiori* those incentives remain for affiliated systems.[72] Moreover, GTE noted Viacom's own testimony regarding the general and national power of cable operators to influence the behavior of programming vendors.[73] GTE suggested that in lieu of a flat exemption, the Commission should rely on determinations of public interest under Section 628(c)(4) or a waiver of the rules under Section 1.3 of the Commission's Rules.[74] Viacom's petition also was opposed by Liberty Cable Company Inc.[75] and Bell Atlantic[76] asserting similar arguments raised by other opponents.

34. In response to these oppositions, Viacom contended, *inter alia,* that the existence of price differentials noted by opponents does not refute the Crandall Study's finding that a program service whose affiliated cable systems contribute less than five percent to its subscriber base has no incentive to discriminate. Viacom stated that these opponents have not presented any plausible evidence or theory that would rebut this proposition. Further, Viacom disputed the claims of certain opponents that they have been unfairly treated by Viacom.[77]

35. *Discussion.* We hereby affirm our previous determination on this issue and reject the adoption of a *de minimis* exemption. As noted in the *First Report and Order*, the issue of a *de minimis* exemption was raised in the Notice of Proposed Rulemaking. In the *First Report and Order*, the Commission ultimately rejected this exemption, in part, because it could not be determined with certainty the point at which a vertically-integrated programming vendor does not have the incentive to discriminate. Moreover, the Commission not only was concerned with a cable operator's control over programming, but

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[72] Opposition of GTE, July 14, 1993 ("GTE Opposition") at 3, referring to 8 FCC Rcd at 3370.

[73] *Id.* at 3.

[74] *Id.* at 5-6.

[75] Opposition of Liberty Cable Company, Inc. To Petitions For Reconsideration ("Liberty Cable Opposition") at 3-4.

[76] Bell Atlantic Comments at 4 and Bell Atlantic Reply at 2-3.

[77] For example, Viacom stated that CSS fails to disclose that it enjoys the same rates for Viacom's Showtime and The Movie Channel services as do other HTVRO distributors of those services. Reply Comments of Viacom International, Inc., July 28, 1993 ("Viacom Reply") at 6, n.7.

also recognized that there could be significant influence even with a relatively small vertical interest. While we recognize that there may be situations where an exemption may be appropriate, we decline to adopt an across-the-board *de minimis* exemption.

36. While the Crandall Study correctly notes that vertical relationships in the cable industry are efficient in many ways, we believe the Crandall Study does not provide a sufficient basis for reversing our previous denial of this exemption. First, the analysis in the study does not address the full array of public policy goals implemented in the program access rules in order to prohibit practices that are unfair and discriminatory. Indeed, we previously stated that it was the policy of Congress in the 1992 Cable Act to: "(1) promote the availability to the public of a diversity of views and information through cable television and other distribution media; (2) rely on the marketplace, to the maximum extent feasible, to achieve greater availability of the relevant programming; (3) ensure that cable operators continue to expand, where economically justified, their capacity and the programs offered over their cable systems; and (4) ensure that cable television operators do not have undue market power vis-a-vis video programmers and consumers."[78] While the Crandall study raises a number of issues relating to the incentives of programming vendors and cable operators, and in particular the incentives of *de minimis* vertically integrated programming vendors, the study does not address how those incentives fall within the broad public policy goals. Therefore, we are not convinced that pursuing the Crandall study's recommendation of a *de minimis* exemption would be consistent with our efforts to establish rules that are faithful to the policy goals of Congress. Second, with the exception of DBS, the distribution of multichannel video programming is mostly local in nature. However, the Crandall study does not focus on the impact of discrimination on local competition. For example, the study measures the profitability of discrimination against "national non-cable media such as TVRO distributors or potential DBS system,"[79] in contrast to measuring the impact against local MMDS service. Third, the analysis does not consider the fact that the amount, if any, of vertical integration does not solely drive the incentives of programming vendors to treat distributors differently. Indeed, the size and influence of a customer itself may result in different treatment among technologies, along with other factors as recognized in the justifying factors in the Commission's program access rules.

37. Finally, in passing the program access provisions of the 1992 Cable Act, Congress was concerned with increasing competition and diversity in the multichannel video programming market, as well as fostering the development of competition to traditional cable systems, by prescribing regulations that govern the access by competing multichannel systems to cable programming services.[80] We do not believe that Congress intended the Commission to carve out any exemptions to the program access rules. It is particularly

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[78] *First Report and Order*, 8 FCC Rcd at 3369.

[79] Crandall Study at 11.

[80] *First Report and Order* at 3360.

unlikely that Congress intended such exemptions for an entity, like Viacom, that owns cable systems and controls a large share of the programming market.[81]

B. Minority Ownership

38. Black Entertainment Television, Inc. ("BET") petitioned the Commission to adopt a more flexible attribution standard for minority-owned cable programming vendors or to adopt the single majority shareholder exemption applicable to the broadcast attribution rule.[82] BET contended that the adoption of a more flexible attribution standard for minority-owned cable programming vendors is consistent with the goals of Section 19 (program access) as well as Section 9 (commercial leased access) of the 1992 Cable Act, which allows cable operators to use certain leased access channels for minority programming. BET noted that the goals of Sections 19 and 9 are to increase competition and diversity in the multichannel video programming market.[83] BET further stated that those provisions show that Congress "was acutely aware of the need to assist minority-owned programming sources to further a diversity of viewpoints over cable and other multichannel programming sources."[84] BET contended that, because of the peculiar nature of minority programming (in contrast to programming with mass appeal), BET "needs the flexibility to deal with different program distributors on different terms to obtain access to those distribution sources."[85] In the alternative, BET requested the Commission to adopt the single majority shareholder exception of the broadcast attribution rules. BET argued that the broadcast context is more closely akin to the 1992 Cable Act than is video dialtone, because "[i]n the video dialtone context, there is no stated public interest purpose to promote a diversity of viewpoints, as there is in both the broadcast context and in Section 19 of the 1992 Cable Act."[86]

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[81] Viacom recently acquired Paramount, which further increased Viacom's ownership in the cable programming market.

[82] Petition for Reconsideration filed on behalf of Black Entertainment Television, Inc., June 10, 1993 ("BET Petition"). The single majority shareholder provisions would exclude from the "attributable interest" definition entities in which a single shareholder holds more than a 50% interest. Such entities would be deemed not vertically integrated and therefore not subject to certain of the program access rules, regardless of the size of any cable operator's stake in the entity, on the theory that the unaffiliated majority shareholder will prevent all other shareholders, including any cable investors, from acting anticompetitively.

[83] BET Petition at 3-4.

[84] *Id.* at 3.

[85] *Id.* at 3-4.

[86] *Id.* at 5.

39. Similarly, Liberty Media contended that the 5% attribution standard is overinclusive and arbitrary[87] and that the Commission's adoption of a program access attribution standard by analogy to video dialtone is inappropriate.[88] Liberty Media requested that the Commission revise the attribution standard "so that the reach of its program access and antidiscrimination rules extends only to those situations in which Congress has perceived a potential problem in the marketplace, *i.e.*, where cable operators have both the incentive <u>and the ability</u> to compel discriminatory behavior by an affiliated programmer,"[89] or that the Commission incorporate the single majority shareholder, limited partner, and non-voting shareholder exemptions recognized under the broadcast attribution standards.[90]

40. WCA and GTE filed oppositions to BET's petition.[91] WCA argued that BET's request is inconsistent with the purposes of Section 628 and that "there is no indication in Section 628 or its legislative history that Congress intended the Commission to establish special program access rules for educational services or those that are minority owned."[92] WCA also contended that BET's reliance on Section 9(c) of the 1992 Cable Act is particularly misplaced because that section shows that, when Congress intended special treatment for minority and other programming, it explicitly so stated. For example, Section 9(c) expressly allows cable operators to use certain leased access channels for educational or minority programming.[93] WCA stated that "subjecting BET and Discovery to the modest anti-discrimination rules of Section 628 will assure the greatest possible number of subscribers will have access to the minority and educational programming BET [and Discovery] offer."[94]

41. Finally, GTE contended that if a minority-owned cable programming vendors' exemption is adopted, alternative delivery systems may be foreclosed from distributing the

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[87] Petition for Reconsideration filed on behalf of Liberty Media Corporation, June 10, 1993 ("Liberty Media Petition") at 8.

[88] *Id.*

[89] Liberty Media Petition at 12 (emphasis in original).

[90] Id.

[91] In their oppositions, WCA and GTE address together the petition filed by BET and the petition filed by Discovery. Discovery sought an exemption for educational/informational programming. Discovery's petition is discussed, supra.

[92] WCA Opposition at 20-21.

[93] *Id.* at 21.

[94] *Id.* at 21-22.

BET-type services because of cable's market power. GTE opposed "blanket exceptions to the program access rules," and proposed that "alternative media [be given] the opportunity to comment, in a public-interest proceeding, on the pros and cons of exclusive contracts where minority, educational and informational programming is concerned."[95] GTE further stated that, to the extent the exceptional treatment goes beyond exclusive contracting, public interest determinations would be available under the Commission's general waiver authority.[96]

42. BET replied to the WCA and GTE oppositions, contending that, since the Commission adopted broadcast attribution standards in its horizontal and vertical ownership proceedings, those standards should also apply to program access.[97] BET also disputed WCA's contention that Section 9(c) shows that when Congress intended to afford minority programming special treatment, it so provided. BET argued that Section 19 and Section 9 both seek to increase competition and diversity in the multichannel video programming market, and that Congress left it to the Commission to determine how to fulfill this purpose.[98]

43. Various parties also opposed Liberty Media's petition contending, *inter alia*, that the goals underlying the Commission's broadcast rules differ from those under the 1992 Cable Act.[99] For example, DirecTv opposed Liberty Media's petition contending that there are different rationales underlying the broadcast rules and the 1992 Cable Act.[100] WCA contended that Congress not only was concerned with cable's direct control over programming, but also sought to address inequities resulting because "[v]ertically integrated program suppliers also have the incentive and ability to favor their affiliated cable operators over nonaffiliated cable operators and programming distributors using other technologies."[101]

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[95] GTE Opposition at 6.

[96] *Id.* at 7.

[97] Consolidated Reply To Oppositions To Petition For Reconsideration, July 26, 1993 ("BET Reply") at 1-2.

[98] *Id.* at 2.

[99] Comments of Bell Atlantic on Petitions for Reconsideration at 9-10,WCA Opposition at 17, Opposition of DirecTV, Inc., To Petitions for Reconsideration, July 14, 1993("DirecTv Opposition") at 6, Reply of the United States Telephone Association, July 27,1993 ("USTA Reply") at 1. USTA also generally opposes the petitions filed by Viacom, Discovery and BET seeking the Commission's adoption of exemptions to the program access attribution standard.

[100] Opposition of DirecTV, Inc., To Petitions for Reconsideration, July 14, 1993("DirecTV Opposition") at 6.

[101] WCA Opposition at 18.

44. *Discussion.* We reject BET's request to adopt a more flexible attribution standard for minority-owned programming vendors or the single majority shareholder provisions of the broadcast attribution standard. Neither Liberty Media nor BET raise any new arguments that warrant a change in our determination in the *First Report and Order* that, for purposes of adopting an "attributable interest" standard, the goals behind the 1992 Cable Act are more closely analogous to the goals underlying the video dialtone rules than the broadcast rules. Indeed, similar to the 1992 Cable Act, one of the stated public interest purposes behind the video dialtone rules is to promote the availability to the public of a diversity of views and information through this distribution media.[102] In contrast, the concerns addressed in the Commission's horizontal and vertical ownership proceedings, where the broadcast attribution standards were adopted, are quite different from the concerns in program access. In particular, the amount of ownership and, therefore, an entity's "control" is the focus of the vertical and horizontal ownership rules. By comparison, the attribution standard in the program access rules is focused on the potential "influence" on programming vendor behavior through ownership by cable interests, irrespective of the amount of ownership that may be involved. Thus, contrary to petitioners' position, it is not inconsistent to exclude the single majority shareholder rule from the program access attribution standard. In addition, BET does not offer any explanation as to the type of "flexibility" standard it wants or needs, or what, in lieu of the single majority rule, would provide a more "flexible" standard .

45. Moreover, we do not believe that the adoption of a more flexible attribution standard for minority-owned programming vendors or the single majority shareholder provisions of the broadcast attribution standard furthers the underlying goal of encouraging minority ownership and diversity in programming. Rather, we believe that a departure from the current attribution standard merely raises issues regarding whether minority programming vendors should be able to restrict access to their programming and thus has the potential to conflict with one of the underlying purposes of Section 19 -- to foster the availability of programming to MVPDs.

C. Educational/Informational Exemption

46. Discovery requested the Commission to fashion an exemption to the program access provisions for educational or informational type programming.[103] Discovery argued that such an exemption would be consistent with the purposes of the 1992 Cable Act to

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[102] Memorandum Opinion and Order on Reconsideration in CC Docket No. 87-266 (November 7, 1994) at ¶3.

[103] Petition for Clarification and Reconsideration, filed on behalf of Discovery Communications, Inc., June 10, 1993. ("Discovery's Petition").

promote the availability of programming of an educational or informational nature.[104] Discovery also cited The Children's Television Act of 1990 as evidence of Congressional intent to promote educational or informational type programming.[105] Discovery argued that "common ownership of cable systems and an educational/informational program service should have little effect on the ability of alternative technology distributors to compete with cable . . . . The historic operations of these educational/informational services . . . demonstrates a very high level of even-handedness in dealings with all distribution technologies."[106]

47. GTE opposed Discovery's request, contending that this exemption ultimately will result in the denial of certain programming services to alternative technologies. GTE instead proposed a case-by-case analysis.[107] CSS also opposed Discovery's petition, contending that an exemption for educational and informational programming "would ultimately protect . . . distributors from unwanted competition. If programming is truly of an educational nature and for the benefit of the public, the goal of the Commission should be to assure its broadest distribution through competing technologies."[108] DirecTV contended "that the creation of such an exemption would in fact have quite undesirable ramifications for alternative MVPDs."[109] Finally, WCA contended that Discovery's past conduct does not provide support for its exemption from the rules.[110]

48. Discovery replied to the oppositions, contending among other things, that educational or informational programming has historically had to rely on investment support from various types of distributors and that there is a need to promote policies that will encourage investment in educational and informational type programming.[111] Discovery contended that exempting such programming from the program access rules will serve the public interest by ensuring that high quality, innovative programming continues to receive

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[104] *Id.* at 3.

[105] *Id.* at 2-3.

[106] *Id.* at 3.

[107] Opposition of GTE at 6.

[108] Statement of Opposition of Consumer Satellite Systems, Inc. to Petitions for Reconsideration at 5.

[109] Opposition of DirecTv, Inc., at 13.

[110] WCA Opposition at 22 n. 52.

[111] Reply Comments of Discovery Communications, Inc., July 28, 1993 ("Discovery Reply") at 5.

financial support.[112]

49. *Discussion.* We deny Discovery's request to exempt from the program access provisions programming of an educational or informational nature. While ample evidence exists that Congress intends to promote this type of programming, (e.g.,The Children's Television Act of 1990), we do not believe that granting Discovery's request is the most appropriate way of effectuating this policy. Indeed, Discovery's petition does not address the underlying purposes of the attribution standard, e.g., an assessment of a cable operator's influence over a vertically integrated programming vendor. Moreover, we believe that the rules should not allow educational and informational programming vendors to pursue practices that could be construed as "unfair" or "discriminatory" in making their programming services available, contrary to the stated goals of Section 628. Rather, we believe that a departure from the current attribution standard has the potential to affect the consistent application of the program access rules and the accessibility of this type of programming. Finally, we find that Discovery has not provided sufficient evidence that this exemption is necessary to attract investment, and that there are no alternative means of attracting financial backing for this type of programming.

D. Exemptions for Marketing/Technology Experiments and Demonstrations

50. The issue as to whether there should be an exemption from the program access provisions in general, or from the attribution standard in particular, for marketing and technology experiments and demonstrations, was not before the Commission in the *First Report and Order*. In any event, Discovery petitioned the Commission to exempt marketing and technology experiments and demonstrations from the program access rules.[113] Discovery contended that, "as new technologies allow distributors to increase the number of services provided and alter the manner in which subscribers interact with those services, a programming vendor's ability to test various program services and technologies designed to allow subscriber interaction takes on paramount importance. The need to structure and conduct such tests on an expedited basis to keep pace with these changes is equally important."[114] Discovery contended that the Commission should not require a programming vendor to seek approval for each marketing and technological experiment because programming vendors need to structure and conduct tests on an expedited basis to remain competitive.[115] No comments were filed either in support of or in opposition to this petition.

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[112] *Id.* at 6.

[113] Discovery Petition at 10.

[114] *Id.* at 10-11.

[115] *Id.* at 11.

51. *Discussion.* The Commission recognizes the necessity for programming vendors to conduct marketing and technology experiments and demonstrations. We believe, however, that to establish the requested exemption to the program access rules would raise unnecessarily the potential for abuse and circumvention of the rules. In any event, we believe that the program access rules already accommodate the need for experiments and demonstrations and that a general exemption is unnecessary. In particular, Note 2 to the program access rules provides in part that "[v]endors may establish price differentials based on factors related to offering of service. . . ." The note goes on to list a number of factors as differences in the offering of service, but indicates that the list is not exclusive and may include "other legitimate factors as standardly applied in a technology neutral fashion."[116] We believe this language could enable a programming vendor to engage in experiments or demonstrations without becoming subject to any general requirement that it provide an experimental service to all MVPDs or that it maintain for a general commercial offering a price that was intended solely for market research purposes. Of course, should a complaint be filed, the Commission will review the particular facts to determine whether the differential in price or other terms offered is justified.

E. Vertical Integration in Market at Issue

52. In the *First Report and Order*, the Commission refused to require, as an element of a claim under Section 628(c), a showing of vertical integration in the specific market at issue:

> [r]ather, the complainant need show only that the relevant programmer or cable operator is vertically integrated in any market. We believe that this approach is most consistent with Congressional intent and best addresses Congress' apparent concern with industry-wide influences that can occur even in the absence of a vertical relationship in the complainant's specific market.[117]

53. Time Warner Entertainment Company, L.P. ("Time Warner") renewed the request that the Commission should require, as an element of a claim under Section 628(c), a showing of vertical integration in the specific area at issue.[118] Time Warner contended that this limitation is necessary because "vertically integrated programming vendors can have the incentive and ability to favor their affiliated cable operators over nonaffiliated cable operators and programming distributors using other technologies, . . . only where they in fact have an

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[116] *First Report and Order*, 8 FCC Rcd at 3506.

[117] *First Report and Order*, 8 FCC Rcd at 3363.

[118] Petition of Time Warner Entertainment Company, L.P., for Reconsideration, June 10, 1993 ("Time Warner Petition").

interest in a local cable operator."[119] Time Warner further contended that the Commission cannot have it both ways:

> [h]aving decided to make its rules applicable only to vertically integrated firms on the ground that Congress was concerned with practices pursued only by vertically integrated firms ... the Commission cannot now go beyond that rationale and regulate conduct that has nothing to do with vertical integration.[120]

54. Time Warner's petition was supported by Landmark. Landmark contended that "[i]n markets where a programmer has no ownership interest in the cable operator, not only would it be illogical, it would be literally impossible for a programmer to engage in anticompetitive conduct as a result of vertical integration, since no such integration exists."[121]

55. Time Warner's petition was opposed by Bell Atlantic, CSS, DirecTv, Liberty Cable and WCA. DirecTv argued that Congress passed Section 628 primarily because of its concern with the overall level of vertical integration between cable operators and video programming suppliers, and a programming suppliers' incentive to discriminate in favor of cable providers. According to DirecTv, this incentive can exist regardless of whether a vertically integrated programming vendor is integrated with a cable operator in a particular geographic market.[122] WCA, along with Bell Atlantic and CSS,[123] argued that there is no support either in Section 628 or the legislative history of the 1992 Cable Act to support Time Warner's contention that the Commission may only regulate activities stemming from vertical integration in a particular market.[124] WCA and Liberty Cable further argued that Congress recognized that a vertically integrated programming vendor has strong incentives to discriminate against non-cable MVPD's, even in markets where the programming vendor does not serve a vertically integrated cable operator.[125]

56. *Discussion.* The Commission denies Time Warner's petition and affirms that, with respect to claims under Section 628(c), there is no requirement to show vertical integration in the specific market at issue. As we previously stated, Congress was concerned

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[119] Time Warner Petition at 7.

[120] Id. at 9.

[121] Landmark Reply at 8.

[122] DirecTv Opposition at 9.

[123] Bell Atlantic Comments at 8; Bell Atlantic Reply at 3-4; CSS Opposition at 3-4.

[124] WCA Opposition at 5.

[125] WCA Opposition at 5; Liberty Cable Opposition at 4.